



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1201 NE Lloyd Boulevard, Suite 1100
PORTLAND, OREGON 97232-1274

Bonneville Power Administration,
U.S. Department of Energy
PO Box 3621-ALP
Portland, OR 97232
Attn: Sue Ludeman/ FOIA Contact
503-230-7334

June 25, 2007

RECEIVED BY BPA FOIA OFFICE THIS DATE: 6.28.07
DATE: 7.27.07
LOG # 07-031

Re: Freedom of Information Act (NOAA Request #2007-00287)

Dear Ms. Ludeman:

Enclosed you will find a copy of a request for documents under the Freedom of Information Act (FOIA), 5 USC 552, made by Ms. Katie Fite of Western Watersheds Project, addressed to the National Marine Fisheries Service (NOAA Fisheries). The requester asks for specific documents related to grazing activity conducted on the Washington Department of Fish and Wildlife owned and managed lands or acquisitions.

We found nine responsive documents that are the exclusive or a primary concern of the Bonneville Power Administration. Per our governing regulations, 15 C.F.R. part 4, we hereby refer the requester to you for further action related to these documents (enclosed).

Thank you for your attention to this matter. Please do not hesitate to call me at (503) 230-5421, should you have questions.

Sincerely,

Sheryl Robinson

Sheryl Robinson
FOIA Coordinator
NMFS NWR

Enclosure





Western
Watersheds
Project

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Working to protect and restore Western Watersheds

April 23, 2007

FOIA Officer
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 9815-0070
98115

RE: Freedom of Information Act Request

Dear FOIA Officer,

Pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552-et seq., Western Watersheds Project hereby requests that you send the following documents, all of which are matters of public record and should be easily available to you.

We are requesting:

Consultation documents related to livestock grazing, livestock permits (temporary or longer term), Pilot Grazing projects, livestock-related MOUs, or any other livestock grazing activity conducted on any WDFW owned or managed lands or acquisitions.

WDFW = Wash. Dept. of Fish & Wildlife

Time period of information request: For the period from 1990 to the present.

The information requested includes all information (field data, reports, letters, analyses, memos, e-mails, phone logs, appointment calendars, environmental analyses, budgets, grants, permits, consultation) related to the above.

If you believe that any portions of the documents requested are exempt from disclosure under FOIA, you are required by the Act to segregate those portions and provide the rest of the information.

If you wish to withhold any documents referred to in this request, please send us an administrative Vaughn Index pursuant to U.S.C. Sec 552 (b) and Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. Denied 415 U.S. 977 (1974). This index should specify the following information about each document withheld:

- The title, author, date of each document withheld.
- A description of each document withheld, including the subject and conclusion of the document.
- A legal citation to the exemption for each document withheld and an explanation of how the exemption applies to each document.
- A list of all documents, including memos, electronic mail, and other communications which are referenced in the withheld document, or are referenced by the withheld document.

This letter describes how and why Western Watersheds Project (WWP) meets the two factors entitling WWP to a fee waiver under the Freedom of Information Act. See 5 U.S.C. § 552(a)(4)(A)(iii). See also 43 C.F.R. Part 2, Appendix D.

Under the fee waiver provisions as enacted by Congress, a requester qualifies for a fee waiver if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Through its own FOIA regulations, the Department of Interior has articulated the following four-part test to determine if a requestor meets the statutory requirements for a fee waiver: (1) Do the records concern the operations or activities of the government?; (2) If so, will disclosure likely contribute to public understanding of these operations and activities?; (3) If so, will release of the requested information contribute significantly to public understanding?; and (4) Is disclosure primarily in the requestor's commercial interest? See 43 C.F.R. Part 2, Appendix D.

WWP meets the four-part test articulated in the Department of the Interior regulations implementing FOIA, and, therefore, NMFS/NOAA Fisheries must waive the fees associated this FOIA request.

Factor 1: Do the requested records concern "the operations or activities of the government"?

Yes. Our request is for documents relating to NMFS's oversight of livestock grazing, threatened, endangered and sensitive/special status species, water quality and riparian areas and other natural resources on public lands, and development of projects to facilitate livestock management or mitigate livestock damage and related fuels or other undertakings. Such management is "operations or activities of the government".

Factor 2: If so, will disclosure likely contribute to public understanding of these operations and activities?

WWP is an Idaho non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West, and informing the public of NMFS's review and oversight of endangered, threatened, and sensitive species, across the Columbia Basin. WWP has over 1200 members, including members who live in Washington and who take a special interest in these lands. WWP is active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values of western watersheds. To do so, WWP actively participates in agency proceedings concerning federal agency lands in the Interior West including the Columbia Basin and is an Interested Public in livestock grazing on BLM lands in the Columbia Basin. WWP is very concerned about management of livestock grazing throughout the region.

All of the records requested in this FOIA are essential to WWP's mission to protect the land and water of the Interior West including the Columbia Basin, including Washington, and to educate its members and the general public to enable and empower them to advocate for protection of our public lands and wildlife. The informative value of the records requested is that this information enables WWP to inform and educate the public on the management of livestock grazing and natural resources protection for anadromous species.

WWP intends to increase public awareness of management of public lands and important resources including endangered, threatened and sensitive species and the health of important public wild lands within Washington by (1) collecting documents from NMFS/NOAA addressing its management and/or oversight of natural resources and Threatened and Endangered species, (2) employing the substantial analytical abilities of WWP's experts and employees, trained in the fields of biology, range management, riparian ecology, as well as other scientific disciplines, to conduct an independent analysis and assessment of NMFS/NOAA and other agency actions in managing our public resources, and (3) disseminating this analysis and assessment through public education and outreach activities including, presentations at local, regional and national conferences, presenting the information to national, regional and local media outlets, posting the information on WWP's website, participation in administrative processes, litigation and other enforcement of federal environmental laws.

Specifically, the requested information will contribute to the public understanding of federal and other oversight of endangered, threatened, and sensitive species. There is no other way to obtain information on consultation over impacts of the management of livestock grazing and other activities except through these documents, which are supposed to be public documents, available to the public for comment or reference. These documents help educate the public about what the federal government is doing to manage, regulate, or advise on livestock grazing, to protect threatened, endangered and other species, and otherwise protect and restore the natural resources under its management. There is substantial public interest in NMFS/NOAA fisheries, other federal agencies and state WDFW or other agency activities relating to endangered, threatened and sensitive species, and in the quality of the data and science that agencies use to undergird management decisions. The public interest to be served by disclosure of these

documents is, therefore, informing and educating the public about management of anadromous fish and public lands and public resources within the Interior Columbia Basin and the District.

Furthermore, federal agency planning and decisionmaking are supposed to be public processes in which information is supposed to be readily available to the public at large. Unfortunately, in many instances such documents as the ones requested here are long, tedious to read, and difficult to understand. Accordingly, it is groups such as the WWP that compile this information into a more readily understandable form for the general public, as well as for our members. WWP's staff has amassed a wealth of expertise and knowledge in examining and analyzing similar documents, and reaching testable, scientific observations and conclusions on the effectiveness of NMFS/NOAA's management of public lands and wildlife. Specifically, WWP's current staff includes scientists with expertise in ecology (Dr. John Carter, PhD, Utah State University) and biology (Katie Fite, MS, Utah State University), and range science and agriculture. Furthermore, all of WWP's staff, volunteers, and board members have vast experiences examining and assessing documents and information similar to the information sought. For example, WWP Advisory Board member Dr. Don Johnson has great expertise in fisheries and riparian issues in the West.

Finally, as previously stated, WWP intends to undertake a dissemination plan designed to distribute the results of WWP's analysis and assessment at a local, state, regional and national level. Specifically, WWP plans on disseminating the assessment and analysis through the following means: (1) presenting the material to its 1200 members, as well as members of other state and national conservation organizations; (2) presenting the materials at local high schools throughout Idaho; (3) presenting the materials at national and regional conferences, including the RangeNet Conference and recent Public Interest Environmental Law Conferences; (5) issuing press releases and presenting the information to national, regional and local media; (6) posting the information (in a compiled and more readily understandable form) on WWP's internet web site, which has over 6,000 visitors a week; and (7) presenting the material to high school and college classes where WWP as a presenter.

By way of example only, WWP has recently disseminated similar analysis and assessment of NMFS /NOAA's and other agency management of our federal public lands and resources through the following outreach avenues: (1) teaching classes at local high schools and universities, (2) presenting the information at national environmental conferences, including RangeNet (attended by several hundred individuals interested in management of public range lands and endangered, threatened and sensitive species), and the Public Interest Environmental Law Conference (attended by several thousand individuals); (3) disclosure to media outlets in local, national and international media outlets, (4) dissemination through WWP's regular on-line newsletter, and (5) posting the information on its website. WWP specifically intends to disseminate its analysis and evaluation to the public through each and every avenue discussed previously.

With respect to WWP's ability to disseminate the information to the public, WWP does so in a wide variety of ways, including: communicating with local, regional and national press outlets (television, radio and print); presentations to our members, presentations to the general public, presentations to members of other conservation organizations; and participation in numerous conferences and public events across the country. For example, WWP placed approximately 165 stories in the print media from November 2002 through December 2003. In addition to these outreach and dissemination efforts, WWP publishes a regular newsletter, including an email newsletter, and has its own web site, in addition to contributing submission to the National Public Lands Grazing Campaign's website, of which WWP is a founding member.

NMFS/NOAA can readily confirm WWP's continuing ability to disseminate information, including information derived by extensive FOIA requests by using Internet search engines such as Google. For example, key words: "Western Watersheds Project" cattle grazing.

Factor 3: If so, will release of the requested information contribute significantly to public understanding

Release of the information will contribute significantly to public understanding of management and oversight of anadromous fish and watersheds within the Columbia Basin, and resources including aquatic species populations affected by these undertakings. First, the information being sought (environmental analysis of project or grazing impacts to ESA species or watersheds) includes data and analysis supporting grazing decisions across federal or state public lands. As such, this information is new, and has not been previously distributed to WWP or the public. In fact, organizations such as WWP provide the primary means by which the public at large is apprised of, and has access to, this information. Furthermore, because the information is supporting data and/or analysis it would also clarify pre-existing information, including current consultation, mitigation, implementation, and agency actions in a CRM Process, Pilot Grazing Program, or other process that may adversely affect watersheds and aquatic biota in the Columbia Basin.

As one of the only organizations specifically dedicated to the preservation and protection of the lands and waters of the sagebrush biome, including the Columbia Basin, WWP is a critically important hub of information for both its members and the public who have an interest in the health and management of our public lands.

As discussed above, disclosure of the requested documents will contribute significantly to the public understanding of government operations and activities relating to livestock grazing, fish, wildlife and bird species and other natural resources. WWP provides a way for the public to better understand NMFS/NOAA management and/or oversight, and the condition of threatened, endangered and special status species, water quality and riparian areas. The release of these documents and their dissemination to the public through public events, web sites, the media, newsletters and other avenues will increase the

knowledge of the public on the management of livestock grazing and natural resource protection in the Columbia Basin, a very important and unique ecological place.

Factor 4: Is disclosure primarily in WWP's commercial interest?

A commercial interest is one that furthers a commercial, trade, or profit interest. WWP has no commercial interest in obtaining this information and requested fee waiver. Rather, WWP is a not-for-profit group that strives to protect the natural resources of the sagebrush biome, and inform the public on management of the public lands and native biota including anadromous fish within this area. Nowhere in WWP's mission statement, by-laws, or charter, does the organization state a profit-motive goal.

Additional Information Concerning Fee Waiver: Legal Background.

In 1986, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information, which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information

132 Cong. Rec. S14298 (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Government Association v. Department of State, 708 F.2d 86, 88-89 (D.C. Cir. 1986).

Fee waivers are essential to such groups, which rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions

The fee waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of

requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (emphasis added).


Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public-interest fee waivers are to be "liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987). "[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public." Ettlinger v. FBI, 596 F.Supp. 867, 873 (D. Mass. 1984) (quoting legislative history). An agency may not refuse a fee waiver when "there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." Id. at 874, quoting Fitzgibbon v. Central Intelligence Agency, Civil No. 76-700 (D.D.C. Jan. 10, 1977). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." Id., citing 5 U.S.C. § 552(a)(4)(B).

In light of these principles, based on WWP's FOIA request, it is clear WWP, a non-profit group interested in oversight of agency management of livestock grazing and resource protection for anadromous fish stocks of the Columbia Basin, and in disseminating information on this issue to its members, members of other local, state, regional and national conservation organizations, the public, and the media, is entitled to a fee waiver for the specific documents requested.

Accordingly, WWP asserts that a fee waiver is proper as it complies with the fee waiver requirements of FOIA, see 5 U.S.C. § 552. If NMFS should deny our fee waiver, please notify us immediately of the costs for these documents so we can proceed from there. Thank you in advance for your prompt reply. Please feel free to contact me if you need any clarification of any of the above information.

Sincerely,


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Western Watersheds Project
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